

NO. 46341-5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LOUIS P. TRUTMAN,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING,

Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. *Watkins* Is Controlling, and Trutman Does Not Distinguish It

In *Watkins v. Department of Licensing*, this Court held that a police officer's uncertified arrest report is admissible in an administrative proceeding to suspend a license under the implied consent law, RCW 46.20.308, if it accompanies a certified report by another officer. *Watkins v. Department of Licensing*, 187 Wn. App. 591, 601-02, 349 P.3d 946 (2015). In this case, the Department's hearing officer admitted the uncertified report of the officer who stopped Respondent Louis Trutman's vehicle and conducted a roadside DUI investigation, which accompanied the certified report of the officer who arrested Trutman and administered the implied consent warnings and breath test. CP 26. The only difference in this case is that the second officer placed Trutman under arrest, whereas the first officer who stopped Watkins also arrested him. This difference is inconsequential. Thus, *Watkins* directly applies to the facts of this case, and this Court should reverse the superior court's reversal of the Department's order. See CP 115-16 (ruling the Department's decision "contained an error of law in that it relied upon an unsworn report to establish probable cause for the arrest.").¹

¹ Trutman also argues that the fellow officer rule should not apply. See Resp'ts Br. at 5-6. But the *Watkins* court did not rely on the fellow officer rule to find the

Trutman does not distinguish *Watkins* or explain why it does not apply here. Resp'ts Br. at 6-10. He merely disagrees with the decision and asks the Court to rely instead on *Nirk v. Kent Civil Service Commission*, 30 Wn. App. 214, 633 P.2d 118 (1981). Resp'ts Br. at 7-10.

But mere disagreement is not enough to overcome the controlling law of *Watkins*. Moreover, this Court considered *Nirk* in *Watkins* and found it distinguishable. *Watkins*, 187 Wn. App. at 603-04. *Nirk* involved a civil service hearing with unsworn witness testimony that resulted in a police officer's permanent discharge. *Id.* at 603 (citing *Nirk*, 30 Wn. App. 214). Comparing the application of the *Mathews*² due process factors to the facts of *Nirk* and those of *Watkins*, the *Watkins* Court found: 1) the private interest in one's driving privileges is not commensurate with the interest in one's employment; 2) the risk of erroneously depriving an individual of driving privileges by admitting an uncertified report whose accuracy was certified by another officer, and the probable value of excluding the uncertified report, were insignificant, whereas the unsworn witness testimony in *Nirk* was not otherwise supported; and 3) the additional administrative burden of requiring the State to obtain a certification from each witness whose statement accompanied an officer's

unsworn report was admissible, and the Department does not rely on the rule in its opening brief. The Court should disregard the argument.

² *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

certified report would compromise the intentionally swift license revocation procedure in the implied consent statute. *Id.* at 603-04.

Thus, this Court, fully aware of the facts, analysis, and outcome in *Nirk*, decided that *Watkins* was different. The fact that Trutman's commercial driver's license is also suspended should not change the analysis or make *Nirk* apply because, unlike the civil service commission in *Nirk*, the Department is only sanctioning Trutman's driving privileges; it has no direct impact on or authority over his employment. *See* Resp'ts Br. at 8-9. Since the facts of this case are nearly identical to the facts of *Watkins*, *Watkins* applies and *Nirk* does not. The Court should so hold.

B. The Breath Test Issue Trutman Raises Is Not Before the Court

Trutman also argues that the breath test results were inadmissible because the officer did not check a box on the DUI Arrest Report form indicating he was certified to operate the breath test machine. Resp'ts Br. at 11-12. But Trutman did not seek cross-review of this issue, and, accordingly, the Court's Commissioner did not grant review of it. Ruling Granting Mot. for Discretionary Review of a Court of Limited Juris. Because this issue is not properly before the Court, the Court should not consider it. *See* RAP 2.4(a) (appellate court will grant a respondent affirmative relief only if the respondent also seeks review by the timely filing of a notice of discretionary review).

II. CONCLUSION

The Department respectfully asks the Court to reverse the superior court and reinstate the Department's order suspending Trutman's driver's license.

RESPECTFULLY SUBMITTED this 11th day of April, 2016.

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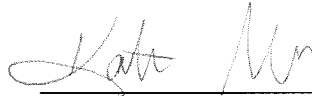
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Katie Mocer, Legal Assistant

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